

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARMELA F. KUHN and DEPARTMENT OF THE ARMY,  
BROOKE ARMY MEDICAL CENTER, Fort Sam Houston, TX

*Docket No. 03-3; Submitted on the Record;  
Issued January 7, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Appellant, a 54-year-old seamstress, filed a claim for benefits based on occupational disease on February 24, 1994, claiming she developed a right elbow tendinitis condition causally related to factors of her employment; *i.e.*, repetitive motions entailed by her job duties. The Office accepted this claim for epicondylitis of the right elbow, carpal tunnel syndrome and right rotator cuff syndrome. Subsequently, the Office accepted the conditions of left carpal tunnel syndrome, left cubital tunnel syndrome, left shoulder impingement and calcific tendinitis.

By decision dated April 7, 2000, the Office granted appellant a schedule award for an eight percent permanent impairment of the right upper extremity for the period February to August 12, 2000 for a total of 3.12 weeks of compensation.

By decision dated January 5, 2001, the Office granted appellant a schedule award for a 26 percent permanent impairment of the left upper extremity for the period September 26, 2000 to April 11, 2002 for a total of 81.12 weeks of compensation.

By letter dated July 19, 2002, appellant requested reconsideration of the January 5, 2001 Office decision. Appellant did not submit any additional medical evidence with her request.

By decision dated September 12, 2002, the Office denied reconsideration without a merit review, finding that appellant had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error, and that there was no evidence submitted that showed that its final merit decision was in error. The Office therefore denied appellant's request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.607(b).

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle an employee to a review of an Office decision as a matter of right.<sup>2</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

(1) end, or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>3</sup> As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. The Office issued its last merit decision in this case on January 5, 2001. Appellant requested reconsideration on July 19, 2002; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

In those cases where a request for reconsideration is not timely filed, the Board had held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>6</sup> Office procedures state that the Office will reopen an appellant's case for merit review, notwithstanding the one-

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<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>3</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advances a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office. *See* 20 C.F.R. § 10.606(b).

<sup>4</sup> 20 C.F.R. § 10.607(b).

<sup>5</sup> *See* cases cited *supra* note 1.

<sup>6</sup> *Rex L. Weaver*, 44 ECAB 535 (1993).

year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.<sup>7</sup>

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.<sup>8</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>9</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>10</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>11</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>12</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>13</sup> The Board makes an independent determination of whether an appellant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>14</sup>

The Board finds that appellant's July 19, 2002 request for reconsideration failed to show clear evidence of error. Appellant did not submit any medical opinion evidence with her request. In addition, appellant did not present any evidence of error in her request letter. Consequently, appellant has not met her burden to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying further review.

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<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

<sup>8</sup> See *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>9</sup> See *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>10</sup> See *Jesus D. Sanchez*, *supra* note 2.

<sup>11</sup> See *Leona N. Travis*, *supra* note 9.

<sup>12</sup> See *Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>13</sup> *Leon D. Faidley* *supra* note 2.

<sup>14</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The decision of the Office of Workers' Compensation Programs dated September 12, 2002 is hereby affirmed.

Dated, Washington, DC  
January 7, 2003

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member